No. 15659

United States
COURT OF APPEALS
for the Ninth Circuit

OCEANIC STEAMSHIP COMPANY, a corporation,

Appellant,

vs.

GUY W. SWANSON, INDEPENDENT STEVEDORE COMPANY, a corporation, and PORTLAND STEVEDORING COMPANY, a corporation,

Appellees.

BRIEF FOR THE APPELLEES INDEPENDENT STEVEDORE COMPANY AND PORTLAND STEVEDORING COMPANY

Appeal from the Judgment of the United States District Court for the District of Oregon.

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STATEMENT OF THE CASE

Swanson, a longshoreman, obtained a judgment against Oceanic Steamship Company for injuries received on the latter's ship, VENTURA. The steamship company, as third-party plaintiff, sought indemnity

from these appellees. Judge McColloch denied indemnity. Oceanic appeals from that denial.

At the outset it is well to understand that this is an action on contract. The contracts, therefore, must be looked to to determine the relationship of the parties. Oceanic contends that the stevedore companies breached their contracts by performing the work negligently.

Judge McColloch held:

1. That neither stevedore company breached its contract;
2. That neither was negligent;
3. That none of the acts of which Oceanic complained was a proximate cause of the accident to Swanson; and
4. That the sole proximate cause was the unseaworthiness of the ship's hatch covers, and the negligence of Oceanic in that respect.

These are findings of fact. Even if this case were to be tried *de novo,* the evidence would compel the same findings. But since it is not to be tried *de novo,* the only question before this Court is whether these findings are clearly erroneous. (McAllister v. U. S., 348 U.S. 19, 20; 99 L. Ed. 20, 24). We intend to show that they are not.

THE FACTS

While the steamship was at Newport, Yaquina Bay, Oregon, the third-party defendant, Independent Stevedore Company, performed some work as an independent

stevedore contractor. Its contract is Exhibit 45A. There is nothing in it requiring especial attention. In it the stevedore company agreed to "handle the loading at Coos Bay and Newport" at certain rates and under certain conditions. In doing this work it "covered up" (i.e. replaced the hatch covers on) No. 3 lower tween deck hatch, and in so doing left the No. 7 strongback protruding slightly above the levels of the other strongbacks because it would not sink completely into its sockets; with the result that the ends of those hatch covers which met on this strongback were slightly elevated. Finding VI, Tr. 37. There was no cargo on top of this hatch. It was all plainly exposed. And the responsible ship's officers watched it being covered up, and knew of its condition. This would be their duty anyway. But we do not have to rely on that. It is plain from the evidence itself that they watched the covering up, knew the condition in which the hatch was left, and accepted it.

"Q. Did you as Chief Mate keep track of the loading at Yaquina Bay and *what the longshoremen did?*

A. No. We have a cargo boatswain. The *second officer, he keeps track of the work* along with the supercargo and the loading bosses." (Emphasis supplied.) Tr. 237.

"Q. Did you inspect the covering up of the hatch at Yaquina?

A. Not the covering up. I was down there when they took them off and checked up the hatchboards. *It was one of the other officers checked that, or I presume he did.*

Q. At Yaquina?

A. At Yaquina, yes.

Q. *You mean he checked the covering up?*

A. *I think so, yes.*

Q. It is the right of a Mate at any time he sees stevedores doing work on a ship that he doesn't approve of to stop the work, isn't it?

A. *That is right, yes.*" (Emphasis supplied.) Tr. 239.

When the vessel, a short time after, arrived at Portland, the third-party defendant, Portland Stevedoring Company, as a stevedore contractor, did some work on the vessel under its contract, Exhibit 45B, certain provisions of which will be adverted to later. As part of its work it was going to load lumber in this No. 3 tween deck, which necessitated the longshoremen walking over and working upon this hatch. Finding VII, Tr. 37. The hatch covers for this hatch, were of metal and were badly warped, dished, bent, defective and unseaworthy. In view of these conditions and the slight rise at No. 7 crossbeam, the hatch boss and longshoremen of Portland Stevedoring Company determined, before going to work on the hatch, to "floor off" the hatch by laying lumber on top of all the hatch covers of the whole hatch, thus making a floor covering the whole hatch, and so making it a safer place on which to work. Before doing this they found that the slight rise caused by the No. 7 strongback could be got rid of if they exchanged the No. 7 and No. 1 strongbacks, and that when so exchanged all the strongbacks would fit snugly and level in the sockets and all hatch covers would then be level. They therefore proceeded to do this, of course first removing the necessary hatch covers for the purpose, and replacing them after the exchange had been made. Findings VIII and IX, Tr. 38-9.

"This work of replacing the hatch covers was merely the normal, routine work of covering up the hatch by placing the hatch covers on the strongbacks, which were now perfectly in place. It was while doing this that plaintiff Swanson, because of the aforesaid defective and unseaworthy condition of the hatch covers, and without any fault on the part of third-party defendants, fell into the hold and was injured." Finding IX, Tr. 38.

"The plan to floor off the hatch with lumber had been concurred in by the ship's supercargo, who cooperated with the hatch boss of Portland Stevedoring Company in furnishing lumber for that purpose, and said plan was later carried out." Finding X, Tr. 38.

"Third-party defendant Independent Stevedore Company was not negligent and did not breach its stevedoring contract because of the manner in which it set the strongbacks and covered up the hatch at Yaquina Bay, or at all, and its acts in that regard were not a proximate cause of plaintiff's injuries, nor can it be supposed that they were within the contemplation of the parties when said stevedoring contract was made." Finding XI, Tr. 38.

"Third-party defendant Portland Stevedoring Company was not negligent, nor did it breach its stevedoring contract in any particular, by or because of the manner in which it did the work at No. 3 'tween deck hatch, as aforesaid, nor in respect of any of those facts, things or circumstances which caused plaintiff's injuries, or at all." Finding XII, Tr. 39.

"The said defective hatch covers were tendered to Portland Stevedoring Company by Oceanic Steamship Company, and the Stevedoring Company was invited by the Steamship Company to use them as they were. There was no duty on the Stevedoring Company to point out to the ship the defects in the hatch covers, and the Stevedore

Company, in flooring off the hatch, as aforesaid, was making the hatch a safer place upon which to work." Finding XIII, Tr. 39.

"The said hatch covers were unseaworthy as aforesaid, and the third-party plaintiffs were negligent in permitting and allowing them to become in such condition, and in failing to provide good and sufficient hatch covers. Third-party plaintiffs and the ship's officers knew of this condition." Finding XIV, Tr. 39.

"The sole and proximate cause of the injuries to plaintiff Swanson was the said defective and unseaworthy condition of the hatch covers and the negligence aforesaid, and his injuries are in no way attributable to either of the stevedore companies." Finding XV, Tr. 39-40.

ARGUMENT

Independent Stevedore Company

The case against Independent must fail for several reasons:

1. The most obvious and compelling reason is that Independent's act in leaving No. 7 cross-beam, and the tip ends of the hatch covers resting on it, slightly elevated can by no stretch of reasoning be considered a proximate cause of Swanson's accident at all. For when Swanson got hurt, the beam had already been removed by Portland Stevedoring Company and exchanged with No. 1 beam, so that all beams were then level. Independent's act in leaving the beam not completely sunk in its sockets had disappeared and was out of the case. So were the hatch boards which had been resting on it. They had been removed by Portland and were lying in

the wings of the tween deck. From that time on, Swanson and the other longshoremen of his gang were merely engaged in the normal and routine job of covering up a hatch where all beams were in place,—the easiest kind of a routine job, if the hatch covers themselves, provided by the ship had been seaworthy and not dished and warped out of shape. The plain, proximate cause of Swanson's fall was not the No. 7 beam nor the manner in which the hatch covers *had* rested on it. The plain proximate cause was, as the Court found, the defective, dished, warped, unseaworthy hatch covers. Findings XI and XV.

2. Another reason why the case against Independent must fail is this: It was not negligent; nor did it breach its contract. All it did was to cover up the hatch, leaving the No. 7 strongback not completely sunk into its sockets, so that the ends of the hatch covers where they met and rested on this strongback were slightly elevated above this hatch. But they still rested on the flanges of the strongback. They did not fall down, nor is there any proof that so placed (except for their own bad condition) they would have fallen down, and the condition was *open and apparent to anyone*. For all Independent knew, it might have been the intention to take them off at the next port of call for further loading into that hatch, or for the stevedores at that port to rearrange them at that port for their own purposes,—a very common practice. The Trial Court therefore properly found that Independent was not negligent and did not breach its contract. Finding XI.

3. A third reason why the case against Independent must fail is this: Swanson's fall in replacing the hatch covers can in no way be regarded as within the "contemplation of the parties" when Independent entered into its stevedoring contract with Oceanic. Finding XI. As your Honors well know, the law is different between torts and contracts. In torts the damages must result as a proximate cause of the tort, but need not be foreseeable. In contracts, on the other hand, the breach of contract must be not merely the proximate cause of the damages, but in addition, the damages must be such as were reasonably foreseeable and in the contemplation of the parties, as likely to follow from a breach of the contract. It can hardly be said that Independent could foresee that in any rearrangement of the hatch covers by a future stevedore, for its own purposes, a man, in performing the purely routine work of covering up, would fall,—barring of course the faulty hatch covers, which were always a menace, and no responsibility of Independent's.

> "In an action for tort, the damages recoverable may include all injuries or losses which are the natural, proximate, and probable consequence of the wrong complained of, and it is often stated in contract actions that the damages must be the natural and probable consequences of the breach of the contract. In actions upon contracts, however, the damages must also be such as can be said to have been within the contemplation of the parties at the time of the making of the contract." 15 Amer. Jur., Damages, §18.

> "Compensation is given for only those injuries that the defendant had reason to foresee as a probable result of his breach when the contract was made." Williston on Contracts, Vol. 5, §1347.

The distinction is also pointed out in Sedgwick on Damages, 9th Edition, Vol 1, §142.

4. Even if Independent's act were a breach of its contract with Oceanic (which was not the case), still Oceanic could not recover an indemnity, because its own wrong in furnishing the unseaworthy hatch covers would preclude it.

The Halcyon case, 96 L. Ed. 318;
The Hawn case, 98 L. Ed. 143;
The Matthews case, 182 F. (2d) 322.

Portland Stevedoring Company

There is no case against Portland Stevedoring Company because, as the Court found, it was not negligent and nowhere breached its contract with Oceanic. That contract provides in §1:

> "The stevedore hereby accepts such engagement and agrees to do and perform all the work required by it to be done or performed under this contract in an economical and efficient manner and in accordance with the best operating practices, to exercise due diligence *to protect and safeguard the interests of the Steamship Company in all respects,* and to *avoid any delay,* loss, or damage whatsoever to the Steamship Company."

The contract reiterates this in §4(b) of Part II, wherein it is stated that the stevedore "agrees to furnish its best *skill and judgment* in planning, supervising and performing the work, to make every effort to *complete the work in the shortest time practicable* and to cooperate fully with the Steamship Company in *furthering the latter's interest.*" Exhibit 45B.

The Stevedore Company acted throughout strictly in accordance with these provisions when it found the uneven conditions and bad hatch covers at No. 3 hatch lower tween decks. It exercised its "best skill and judgment." (Lundstrom, the hatch boss who was in charge, was a man with 37 years' experience. Tr. 129.) It exercised "due diligence to protect and safeguard the interests of the Steamship Company" by *not allowing* its men to incur a possible hazard by working on the hatch, and thus give rise to a claim against the ship in the event of an accident. Instead, it protected the interests of the Steamship Company by leveling the beams and recovering the hatch, (turning the dished hatch covers upside down so that they would rest on their four corners and would not tip), and flooring off the hatch with lumber to make it safer to work thereon,—all in the interests not only of the men themselves, but of the Steamship Company.

In doing so it complied with the contract requirement "to avoid any delay" and "to complete the work in the shortest time practicable." If it had not acted as it did, all work at that hatch would have stopped and the delay to the ship would have been of indefinite duration and costly.

The theory of appellant was that the Stevedore Company "permitted" its men to work on this hatch when it was in a dangerous condition, citing American President Lines v. Marine Terminals Corp., 234 F. (2d) 753. But that is just what the Stevedore Company did *not* do.

Instead it removed the alleged danger. How different that is from the American President Lines case, cited by appellant. (234 F. (2d) 753). In that case the ship told the stevedore to *remove* all the defective strongbacks from the hatch and lay them to one side on the deck. If the stevedore had done this, the *unseaworthy condition* of the ship would have been *removed* and the ship would have become, so far as the immediate work was concerned, completely seaworthy. The element of unseaworthiness would have been out of the case. The stevedore did not do this. It allowed the defective strongbacks to remain in place and thereby *made the ship unseaworthy* in that respect. It created the unseaworthiness. The act of the stevedore was grossly negligent and the court held that it violated its contract to do the work safely. In the present case, the Portland Stevedoring Company did the very thing for which the stevedore in the American President case was condemned for *not* doing,—namely, removing the alleged dangerous condition and making the hatch safe.

It is perhaps worthy of remark that, on this appeal, appellant has shifted his ground. The case against Portland was tried solely on the theory that Portland had "permitted" its men to work on the hatch boards knowing that they were unseaworthy. This is the specific and only charge made in the Pretrial Order. It is in these words:

> "In allowing and permitting its stevedores, including the plaintiff, to work on the hatch boards knowing that the said hatch boards were unseaworthy, if in fact the said boards were unseaworthy as alleged by plaintiff." (Tr. 11)

But on this appeal, appellant now contends that Portland was negligent and breached its contract, *not* in permitting its men to work on the hatch, but in exchanging the beams, levelling off the hatch and putting a floor on top of it. Specification of Error No. 8 says:

> "The Trial Court erred in failing to find that Portland was a primarily and actively negligent party whose negligence in permitting its employees to remove and replace the strongbacks and hatch covers and to walk upon the hatch covers while some were removed, instead of merely building a floor over them as they lay, was a proximate cause of the accident to Swanson." Brief, p. 9.

And again, in Specification of Error No. 13, appellant says that the contract obligation

> ". . . was breached by Portland by its negligent performance of its work in allowing its employees, particularly Swanson, to remove and replace the strongbacks and hatch covers and to walk upon the hatch covers while some were removed, instead of merely building a floor over them as they lay." Brief, p. 10.

And the text of the Brief is filled with arguments to the same effect. For example,

> "This was the fateful decision. By refraining from exchanging the strongbacks, the hazard of lifting and carrying the individual hatch covers off and on the hatch would have been avoided." Brief, p. 20.
>
> "The decision to switch the strongbacks was made in the absence and without the consent of any employee of Oceanic. The decision was entirely that of the employees of Portland. Everything was under their control." Brief, p. 21.
>
> "The action of the gang boss and the longshoremen cannot be reconciled with the duty of Portland to

use due diligence, to work in the most efficient manner and in accordance with the best operating practices and to avoid any loss or damage to Oceanic." Brief, p. 21.

"No injury could have occurred if Portland's employees had not acted. They refused to work at first and then, among themselves, determined the method to be followed. The method they selected resulted in injury to Swanson." Brief, pp. 22-3.

"If the hatch covers had not been removed, Swanson could not have fallen through the opening." Brief, p. 28.

In short, appellant has departed from the sole allegation in the Pretrial Order on which the trial against Portland was had, and now in his Brief is criticizing Portland for doing the very thing which the stevedore in American President Lines was held liable for not doing, i.e., correcting the ship's defects insofar as possible and making the hatch safe.

Incidentally, it is somewhat curious to note in appellant's Brief, at page 30, that "the covers had been in use for a long time and had not been the subject of any complaint known to Oceanic." We say this is curious because appellant's witness, Cuthbert, Chief Mate on the VENTURA, testified that he had periodically inspected the hatch boards (Tr. 234), knew their condition (Tr. 235), knew they were in the same condition as shown in the photographic exhibits (Tr. 236), and that longshoremen and stevedoring companies had been complaining about their condition for four years (Tr. 243, Tr. 245). The Trial Court found that Oceanic and the ship's officers knew of their condition. Finding XIV.

The Portland Stevedoring Company was not negligent, and not only did not violate its contract, but it had the active consent and cooperation of the ship's supercargo in furnishing to the stevedore, on the latter's request, the lumber to floor off the hatch.

The plain and sole cause of the accident was the defective hatch covers. And the Trial Court has so found. Finding XV, Tr. 39-40.

Can it be the law that a ship can invite the stevedore to use hatch covers, which the ship tenders to the stevedore as being all right, and then when an accident happens, hold the stevedore liable for having accepted the ship's invitation? The answer to that is a plain "No."

It must be remembered that the obligation of the stevedore to the longshoreman is very different from its obligation to the ship. Its obligation to the longshoreman is to pay compensation under the Compensation Act,—not damages for a tort. Its obligation, on the other hand, to the ship is to perform its contract; but with the tools and appliances furnished by the ship. Its contract is qualified by that. And when it goes ahead and uses those tools and appliances which the ship has invited it to use,—it may have done a wrong to the longshoreman —but it has done no wrong to the ship. It has performed its contract.

As the Court of Appeals for the Second Circuit said in the Matthews case, 182 F. (2d) 322:

> "In the case at bar, no promise by the employer can be implied that he will not use equipment furnished him by the shipowner to be used for the

> very purpose to which it was put. Nor can a promise be implied that he will use care to detect any defect in the equipment, which patently existed when the equipment was delivered for use by the employer. To imply such a promise would mean that the employer agreed to protect the shipowner against liability arising out of the shipowner's own negligence. In the absence of an express promise such an implication would be utterly unreasonable. Hence we can find no contractual basis for indemnity or contribution. . . ." 182 F. (2d) at page 324.

We are convinced that Portland Stevedoring Company was without any fault whatever. It performed its contract perfectly and that is the only thing in question. If, however, Your Honors should think it was in any way wrong, contributing to the accident, still under the Hawn case, the Halcyon case, the Matthews case, supra, and others, where there was mutual fault, Oceanic could not have indemnity. We supplement what was said in the Matthews case by citing Hagans v. Farrell Lines in the Third Circuit, 287 F. (2d) 477. In that case Farrell was the shipowner. Hagans was the longshoreman. Lavino was the stevedore. The court said:

> "Here, the ground upon which Farrell was held liable to Hagans was its own doing; as between Farrell and Lavino, Farrell had assumed the responsibility. If anything, Lavino only contributed to the happening of the accident. But if Lavino failed to perform its work perfectly, we are constrained to hold that, in the face of mutual violations, Farrell is not entitled to full indemnity, and, of course, it cannot have contribution." Page 483.

We do not close without noticing briefly appellant's reference to the contract provision that the stevedore (Portland) shall be responsible for any and all loss,

damage, or injury to persons arising through the negligence or fault of it or its employees. Appellant's Brief, page 19. This is lifted out of Clause 7 of the contract, quoted in appellant's Brief, pages 18 and 19. That clause is only the more or less common *reciprocal* clause whereby each party agrees to be liable for its own sole negligence. Even if the stevedore had been partly negligent—mutual fault—the clause would have no application. And of course it has no application where, as here, the Trial Court has found on ample evidence that the stevedore was not negligent at all.

CONCLUSION

This action for indemnity is an action in contract. The stevedore contracts must be looked to to determine the obligations of the stevedores.

The Trial Court has found that neither stevedore was at fault in any respect.

And that the sole proximate cause of the accident was the faulty and unseaworthy hatch covers.

Even if this were a trial *de novo,* the evidence would compel the same conclusion.

But it is not a trial *de novo*. The only question here is: Was the Trial Court's decision "clearly erroneous"?

We respectfully submit that it was not.

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ERSKINE WOOD.